SIVAPRAGASAM NAGAMANY

v.

AMARAVATHY V NADESON & ANOR

HIGH COURT MALAYA, IPOH
PS GILL J
[CIVIL SUIT NO: 243-1980]
19 NOVEMBER 2001

CONTRACT: *Specific performance - Oral contract - Sale of land - Oral promises to transfer property to purchaser - Draft agreement for transfer prepared by solicitor but not executed - Vendor refused to effectuate transfer - Whether there was a concluded contract - Whether there was an agreement to be enforced - Specific Relief Act 1950 s. 11(2) - Rules of the High Court 1980, O. 81(1)(a)*

The plaintiff is the executor of the estate of his deceased mother ('Mrs Nagamany') while the defendants are administratrixes of the estate of one Ayaduray Sugirtha Lingam ('Lingam'). In this case the plaintiff is claiming, *inter alia*, for specific performance of an oral agreement, which the plaintiff said was made between Mrs Nagamany and the first defendant on 17 March 1973, respecting a certain property in Ipoh, Perak ('the property').

The facts were that in 1960, the plaintiff's father ('Mr Nagamany'), since deceased, had purchased the property from Moorthy and Lingam, the legal and beneficial owners respectively of the property. The parties to the purchase being close relatives, no formal documentation was prepared or executed in respect of the transaction. Both Moorthi and Lingam nonetheless undertook to transfer the property to Mr Nagamany. Moorthy died in 1966. Thereafter, the property was however transferred to Lingam, upon Lingam's undertaking that he would transfer same to Mr Nagamany. Lingam did not honour his words, and so, till Mr Nagamany's death in February 1973, or Lingam's demise in March 1973, the property remained in Lingam's name.

On 17 March 1973, Mrs Nagamany approached the first defendant, whereupon the latter orally agreed to transfer the property to her upon Letters of Administration being extracted and the necessary orders obtained. Further to the promise, on 16 February 1974, the first defendant instructed a solicitor to prepare an agreement to transfer the property to Mrs Nagamany, which the solicitor did. However, by letter dated 13 September 1974, the first defendant withdrew her verbal undertaking to transfer the property, and instead gave Mrs Nagamany an option to purchase the property for RM40,000. Subsequently, the first defendant gave Mrs Nagamany three months' notice to vacate the property, and failing that, commenced distress proceedings against

her. Mrs Nagamany retaliated by filing the present action seeking for specific performance of the first defendant's oral promise and other relief. Before the learned judge, the defendants *inter alia* argued that the alleged oral agreement, if at all there was one, was unenforceable in law.

Held:

[1] To say that an oral agreement cannot be enforced is a totally misconceived proposition of law. Quite clearly, an oral agreement comes within the short compass of O. 81(1)(a) Rules of the High Court 1980, so long as the agreement is not nebulous in terms of its subject matter, price or conditions. (pp 716 h & 717 a-b)

[2] Specific performance is an equitable relief given by the court, to enforce against the defendant the duty of doing what he agreed by contract. To invoke the remedy, three conditions must be fulfilled, namely, the contract (i) is valid in form (ii) has been made between competent parties; and (iii) is unobjectionable in nature and circumstances.
(pp 717 g & 718 c-d)

[3] In the present case, apart from the oral agreement between Mr Nagamany and Mrs Lingam, there was equally a draft agreement prepared by a solicitor between Mrs Nagamany and the first defendant wherein the salient features of the said sale of the property were agreed upon, albeit not executed. This more than suffices for a firm concluded contract. Clearly, a valid agreement had been reached between the first defendant and Mrs Nagamany. (p 718 h-i)

[4] On the strength of the draft agreement of 16 October 1974, and the totality of the evidence, the plaintiff had established, on a balance of probabilities, a case of specific performance of an agreement to transfer the property to him as beneficiary/representative of the estate of Mrs Nagamany.
(p 719 f)

[Judgment for plaintiff.]

Case(s) referred to:
Conlon v. Murray [1958] NI 17 ***(refd)***
Hall v. Warren [1804] 9 Ves 605 ***(refd)***
Hasham v. Zenab [1960] AC 316 ***(refd)***
Haywood v. Cope [1858] 25 Beav 140 ***(refd)***
Jobson v. Johnson [1989] 1 All ER 621 ***(refd)***
Lai Mew Seng v. Cosmopac Sdn Bhd [1998] 1 CLJ 713 ***(foll)***
Oakacre Ltd v. Claire Cleaners (Holdings) Ltd [1982] Ch 197 ***(refd)***
Re Scott and Alvarez's Contract, Scott v. Alvarez [1895] 2 Ch 603 ***(refd)***
Revell v. Hussey [1813] 2 Ball & B 280 ***(refd)***
Robertson v. St John [1786] 2 Bro CC 140 ***(refd)***

Legislation referred to:
Rules of the High Court 1980, O. 81 r. 1(1)(a)
Specific Relief Act 1950, s. 11(2)

Other source(s) referred to:
Snell's Principles of Equity, 28th edn, pp 571-572

For the plaintiff - Rajasingam (Muralidharan); M/s Lewis & Co
For the defendants - Melvin Poi Chew (Joseph Sebastian); M/s Amran, Joseph, Chan & Co

Reported by WA Sharif

JUDGMENT

PS Gill J:

An appeal has been lodged against my decision of June 2001 wherein I had granted judgment for the plaintiff for specific performance of an oral agreement made on 17 March 1973, in respect of land commonly known as CT 23286, for Lot 40415, Mukim Ulu Kinta, with a house erected thereon (hereinafter called "property'). I had equally ordered that all rentals that the plaintiff had paid towards the said property be refunded. However, I dismissed prayer (c), (d) and (e) of the plaintiff's claim as I was of the view that these claims had not be proved by the plaintiff on a balance of probabilities.

Not uncommonly, the suit in question was basically a family dispute, between siblings, and in-laws, in respect of the property CT 23286, Lot 40415, Mukim Ulu Kinta. An entire family was divided over the said property, and the suit revolved over broken promises made in respect of the said property. This scenario will unfold as I plod through the narrative of evidence that emerged in the course of the trial.

I have decided not to dwell on all the evidence that was tendered in the course of the trial as most of it was repetitive in nature, redundant and equivocal.

The factual matrix of the plaintiff's claim which can be culled from the amended statement of claim of the plaintiff is as follows:

1. The plaintiff K Nagamany Nee Sugirtha Letchumy d/o Ayadurai is the executor of the estate and claims beneficial ownership of a parcel of land held under CT 23286 for Lot 40415 in the Mukim of Ulu Kinta with a house erected thereon known as No. 10, Woods Avenue, Canning Garden, Ipoh (hereafter referred to as "the said property").

2. The defendants are the Administratixes of the Estate of Ayaduray Sugirtha Lingam (deceased).

3. K Nagamany (deceased) was the wife of the late Nagamany s/o Kathiravely upon his retirement in 1960 was anxious to purchase a house in Ipoh and did so purchase the said property for a total consideration of $18,500 from K Nagamany's elder brother Ganesa Moorthy (now deceased, hereinafter referred to as "Moorthy") who was the registered owner and AI Sugirthalingam (now deceased, hereinafter referred to as "Lingam") twin brother of K Nagamany who was the beneficial owner of the said property.

4. K Nagamany's late husband tendered the full purchase price of $18,500 to Moorthy on the instructions and full knowledge of Lingam.

5. Although K Nagamany's late husband paid the full purchase price of $18,500, the said property remained registered in the name of Moorthy and both Moorthy and Lingam agreed and undertook to transfer the said property into K Nagamany's late husband's name. However, before the said transfer could be effected Moorthy died on 17 July 1966.

6. Upon the death of Moorthy, Lingam had the said property transferred into his own name on the understanding that the said property would later be transferred into K Nagamany's late husband's name.

7. K Nagamany's husband died on or about 2 February 1973 and Lingam eventually died on 1 March 1973 before the transfer of the said property could be effected into the K Nagamany's name.

8. On or about 17 March 1973 K Nagamany went to the 1st defendant's house in Taiping with AI Sivalingam (brother of the plaintiff hereinafter referred to as "Siva") and there the 1st defendant orally agreed to transfer the said property into the plaintiff's name as soon as the letters of administration had been extracted and the necessary orders obtained.

9. Further to the agreement in para. 2, the defendant requested K Nagamany to hand over an I.O.U. chit for the sum of $10,000 (hereafter referred to as the said chit) which sum was due and owing to K Nagamany's late husband by Lingam and also to deliver and transfer to the 1st defendant the issue document of title for Lot 34406 (hereinafter referred to as the said Lot) belonging to K Nagamany. Siva in collusion with the 1st defendant to defraud K Nagamany of the said property, the said lot and the money due and owing under the said chit advised K Nagamany to comply with their request.

10. Further to para. 9, K Nagamany did deliver the said chit and the issue document of title for the said lot to the 1st defendant who immediately destroyed the said chit in the presence of K Nagamany, Siva and Chandra Kumar, son of the 1st defendant. The 1st defendant further requested K Nagamany to transfer the said lot into the 1st defendant's name which

K Nagamany agreed and the 1st defendant verbally agreed and undertook to transfer the said property into K Nagamany's name as soon as the letters of administration had been extracted.

11. On or about 16 February 1974, K Nagamany effected the transfer of the said lot to the 1st defendant at the office of the 1st defendant's solicitors, M/s. Thevin, Chandran and Siva. K Nagamany was informed by the 1st defendant that the letters of administration has not as yet been granted and the 1st defendant intimated to K Nagamany that she would honour her verbal agreement and undertaking in respect of the said property.

12. Further to para. 11 the 1st defendant to show her sincerity to complete her part of the agreement instructed her solicitors to prepare an agreement to transfer the said property to K Nagamany for love and affection. K Nagamany in reliance of the aforesaid representation effected the transfer of the said lot to the 1st defendant.

13. On numerous other occasions, the 1st defendant made known to K Nagamany that she was ready and willing to transfer the said property to K Nagamany but by letter dated 13 September 1974 withdrew her verbal offer and undertaking to transfer the said property to K Nagamany contrary to her undertaking as therein stated in paras. 11 and 12 and instead gave K Nagamany an option to purchase the said property for the sum of $40,000. Thereafter the agreement was never executed.

14. Sometime in October 1974 the 1st defendant's solicitors sent to the plaintiff a draft agreement in respect of the said property for the plaintiff's perusal and approval which agreement was never executed due to the 1st defendant's revocation of the offer to transfer the said property for love and affection.

15. The 1st defendant further demanded that K Nagamany pay to the 1st defendant rent of $100 per month for occupying the said property and the plaintiff paid the said sum under duress and for fear of being evicted from the said property.

16. By letter dated 28 November 1979, the 1st defendant gave three months notice to K Nagamany to vacate the said premises and upon receiving notice of same, K Nagamany refused to pay the said rent and the 1st defendant, commenced distress proceedings *vide* Ipoh Magistrate's court, Distress Suit No. 740 of 1980.

The unamended defence of the defendant is laid out as follows:

1. Paragraph 1 of the statement of claim is denied save that the plaintiff is a widow. The defendants deny that the plaintiff has any interest in the said property.

2. The defendants admit para. 2 of the statement of claim.

3. Paragraph 3 of the statement of claim is denied save that Lingam was the owner of the property though registered in the name of Moorthy. The defendants deny that the plaintiff's husband purchased the property for $18,500

4. Paragraphs 4 and 5 of the statement of claim is denied.

5. Save that upon the death of Moorthy, the property was transferred into the name of Lingam, para. 6 of the statement of claim is denied. The defendants further stated that the property was transferred into Lingam's name with the knowledge and consent of all the brothers and sisters who were aware that the property belonged to Lingam.

6. Paragraph 7 of the statement of claim is denied save that the plaintiff's husband died on 2 February 1973 and Lingam died on 1 March 1973.

7. The defendants deny para. 8 of the statement of claim.

8. Paragraph 9, 10, 11 and 12 of the statement of claim is denied except that the property known as CT 23286 for Lot 40415, Mukim of Ulu Kinta, registered in the name of the plaintiff was transferred to the 1st defendant.

9. Paragraphs 13, 14 and 15 of the statement of claim is denied. The defendants state that:

   (a) sometime in October 1974 the defendants offered to purchase the property for $32,000.

   (b) This offer was initially accepted by the defendants and solicitors were instructed to prepare an agreement to effect the sale.

   (c) The defendants subsequently changed their minds and offered to sell the property for $40,000 which offer the plaintiff did not accept.

   (d) The plaintiff then assumed the role of a tenant and continued in occupation of the property as a monthly tenant at $100 rental per month.

Before I embark on the merits of this claim, it may be pertinent to note that the defence had in the course of proceedings, *vide* encl. (34) filed an application

to strike out the said suit, on the basis, that the 'chain of transmission', in terms of the estate of the late Mr Nagamany had not properly devolved to the present plaintiffs, as representatives, of the estate of Mrs Nagamany. As such it was the contention of the defendants *vide* encl. (34) that the present plaintiff were incompetent to maintain the suit on behalf of the estate of Mrs Nagamany. I had on hearing submissions on this encl. (34) dismissed it. No appeal was lodged in this respect. The matter is thus cadet questo. Any references thus made on this issue in the submissions at the end of the present trial came within the realm of 'issue estoppel'.

Having had an overview of the said claim, I turn to the evidence that was adduced during the trial. PW1, the son and executor of the estate of the deceased K Nagamany Nee Sugirtha Letchumy d/o Ayadurai (hereinafter referred to as Mrs K Nagamany) and her husband, gave a detailed account of how the said property in question came into the possession of his parents, the deceased Mrs K Nagamany, and his father. In his evidence he stated that the property in question was developed by Canning Garden Estate Ltd. The property was initially purchased by Lingam (since deceased), the husband of the 2nd defendant, who for some apparent reason had the property registered in the name of another brother Moorthy. It was Moorthy who entered into the sale and purchase agreement, with the developer. Moorthy had, however, not commenced part payment towards the said property.

At this particular point of time, the said Moorthy and Lingam were anxious to dispose the said property, and persuaded PW1's late father Mr Nagamany to buy the said property from them at the price of RM18,500. Mr Nagamany agreed to the said proposal of Moorthy and Lingam, and proceeded to pay Moorthly a sum of RM8,289, towards the purchase of the said property, and thereafter continued to make progressive payments to the said developer, towards full payment of the said property. Regrettably nothing of the said transaction was reduced into writing, as it was between family, and based primarily on trust.

According to PW1, a sum of RM18,500 was paid by his father, the late Mr Nagamany, to the said developer, towards the full purchase price. This was within the full knowledge of both Moorthy and Lingam. The progress payments were made by the late Mr Nagamany to Moorthy who in turn paid the same to the developer.

It was an understanding with the late Mr Nagamany, Moorthy, and Lingam that on completion, and issuance of the certificate of fitness, the said property would then be transferred to the late Mr Nagamany.

Apart from the above transaction, Lingam had also borrowed a further sum of RM10,000 from the late Mr Nagamany. No evidence was proffered of this

alleged loan, though the plaintiff tried in a circutious manner, to proffer this evidence from a banking account of his late father Mr Nagamany, which indicates a withdrawal of the said sum.

The property remained in the name of Moorthy till his death, despite repeated requests by the late Mr Nagamany for the transfer of the said property.

The saga continued, on the death of Moorthy in 1966. When approached once again by the late Mr Nagamany, Lingam who was the executor of the estate of Moorthy, told him, that the other siblings of Moorthy, had expressed a desire to have a share of the said house, as they were unaware of the nature of the said transaction between the late Mr Nagamany, Moorthy and Lingam. Lingam promised the late Mr Nagamany, that for practical reasons, the property would be transferred into his name, as executor of the estate of Moorthy, and thereafter on convincing the other siblings of Moorthy, about the nature of the transaction, would in due course transfer it to the late Mr Nagamany. The property was eventually transmitted to Lingam as executor of Moorthy, but he made no attempt to honour his promise, of transferring the said property to the late Mr Nagamany. On being asked about the said transfer – Lingam would become annoyed and berate the late Mr Nagamany, and the deceased Mrs K Nagamany, for not trusting him. Apart from this transaction, Lingam had been constantly borrowing money from the late Mrs Nagamany and was making no attempt to return the said sum.

In 1972, the late Mr Nagamany fell gravely ill and whilst in hospital Lingam had visited him and had allegedly promised the late Mr Nagamany and Mrs K Nagamany that he would transfer the said property into their names soon.

The late Mr Nagamany passed away on 2 February 1973. Once again during the funeral rites, Lingam had told the present plaintiff, and his brother Jegathesan, that the said property belonged to their father, and he would transfer it after the one month death anniversary of their father. Lingam did come for the first month prayer of the late Mr Nagamany, but in vain no attempt was made to regularise the said transaction. Lingam, however, passed away a month after that – on 1 March 1973.

This promise that Lingam had made to the plaintiff, and his siblings about transferring the said property, and which was revealed in evidence was not cross-examined upon by the defence counsel.

After the death of both Lingam and Moorthy and Mr Nagamany, the widows of both Lingam and Mr Nagamany were left to sort out this issue of the said property and the monies owed by Lingam to the late Mr Nagamany. It was at one of these meetings that Lingam's wife agreed to transfer the said property back to the plaintiff deceased. The I.O.U chit allegedly signed by Lingam for

monies borrowed from Nagamany was apparently destroyed by Mrs Lingam at a particular meeting.

It was after one of the series of meetings, that Mrs Lingam had gone to the lawyer's office of Mr Thevanthiran to prepare a draft sale and purchase agreement in respect of the said property. The said agreement is to my mind pivotal to this case, and deserves reproduction.

> AN AGREEMENT made this day of October, 1974. Between AMARAWTHY D/O V. NADASON & PUVANESWARY D/O AS LINGAM as Representatives of the estate of Ayaduray Sigurtha Lingam, deceased both of No. 38, Off Thomson Road, Taiping (hereinafter called 'the first party') of the one part and SUGIRTHA LETCHUMY D/O IA DURRAY (IC No 0625795) of No. 10, Woods Avenue, Canning Gardens, Ipoh (hereinafter called 'the second party') of the other part.
>
> WHEREAS:
>
> (a) Ayaduray Sugirtha Lingam, now deceased was the registered owner of a piece of land held under C.T. No. 23286 for Lot No. 40415, Mukim of Ulu Kinta together with a house erected thereon known as No. 10, Woods Avenue, Canning Garden, Ipoh (hereinafter referred to as 'the said land and premises').
>
> (b) Grant of Letters of Administration have been applied for the Estate of Ayaduray Sugirtha Lingam, deceased (*vide* Ipoh High Court Petition No. 546/73) and has not been extracted as yet.
>
> (c) The First Party has agreed to transfer and assign the said land and premises to the Second Party, and the Second Party has agreed to accept the same upon the terms and conditions hereinafter appearing.
>
> NOW THIS AGREEMENT WITNESSETH as follows:
>
> 1. In consideration of love and affection the First Party hereby transfers/assigns unto the Second Party all the estate and interest of the First Party in the said land and premises free from encumbrances.
>
> 4. ...
>
> 5. ...
>
> 6. ...
>
> 7. ...

The agreement even in its draft form evinced a desire by Mrs Lingam to transfer the said property to Mrs K Nagamany, for love and affection.

It was also agreed upon at the said meeting at the said lawyer's office that Mrs K Nagamany would in turn transfer property namely Lot 33406, Ipoh CT No. 14817 to the 1st defendant Amaravathy a/p Nadeson.

Amaravathy a/p Nadeson, the widow of Mr Lingam, in her evidence had, a different story to tell. She was apparently approached by Mrs K Nagamany, who expressed a desire to purchase the said property from her on the death of her husband. She had stated that the purchase price was RM32,000. Despite this caterogical stance of hers, when confronted with the draft sale and purchase agreement, she denied ever giving instructions to the solicitor Mr Thevanthiran that the property was to be given to the late Mrs Nagamany for love and affection. She was aware that the draft agreement spoke of the property being given to Mrs Nagamany for love and affection, but made no attempt to rectify this with the solicitor. This I found a telling piece of evidence. Despite her vehement objections that the property was never intended to be parted for love and affection, no attempt was made by the defence to subpoena Mr Thevanthiran, the solicitor, to clarify this rather disturbing piece of evidence. It was the plaintiff who did so. Mr Thevanthiran on being examined, maintained that he was responsible for drafting the said sale and purchase agreement in respect of the said property and the terms in it. The defence, rather curiously made no attempt to cross-examine Mr Thevanthiran on this evidence.

Madam Amaravathy, needless to say denied that the late Mr Nagamany had ever contributed towards the purchase of the said property, though she was unable, unlike the plaintiff, to establish in evidence how her husband had managed initially to buy the said property.

The said witness denied that rent was ever collected from the said property by her before 1975. It was only in 1975, that she collected a rent from the late Mrs K Nagamany, in respect of the said property, but then again the late Mrs K Nagamany, ceased paying the rental causing Madam Amaravathy to commence distress proceedings against her. It was this that prompted the late Mrs K Nagamany to file this present action and also to obtain an injunction against Mrs Amaravathy on 28 July 1980. The said injunction reads as follows:

Injunction

...

(a) That the defendants be restrained by injunction in this action or further order until judgment whether by themselves or by their agents or servants or otherwise however from doing the following acts or any of them that is to say interfering with the plaintiff's quiet enjoyment of the parcel of land held under C.T. 23286 for Lot 40415 in the Mukim of Ulu Kinta with a parcel of house erected thereon known as No. 10, Woods Avenue,

Canning Garden, Ipoh (hereinafter referred to as "the said property") levying distress and collecting rent to date.

(b) That the defendants whether by themselves or by heir agents or servants or otherwise be further restrained from selling, transferring or encumbering the said land in any manner until the disposal of the Civil Suit.

(c) That the costs of and incidental to this application be costs in the cause.

(d) Such further or other directions be given as may be deemed necessary by this Honourable Court ... .

This in a nutshell is the evidence of this court. On hearing the evidence and on its evaluation, together with the surrounding documents, I was to say the least, surprised at the earlier attitude taken by the defendant in regard to the draft of the sale and purchase agreement, which spoke of the said property being transferred by the defendant to Mrs Nagamany, for "love and affection". This went again the grain – in respect of the evidence of the defendant, primarily Mrs Amaravathy. Despite knowing what was stated in the agreement, she made no attempt to rectify the alleged error of the said lawyer. This to my mind only goes to prove, that there might be truth in the evidence of the plaintiff, that the property in question was beneficially owed actually by the late Mr Nagamany, and thereafter by his representatives.

There was also evidence of Mrs Amaravathy that the quit rent and assessment of the said property was paid by the late Mrs Nagamany throughout. This I again find perplexing for if one is to believe Mrs Amaravathy, that the property belonged to her husband, why did she permit Mrs Nagamany to continue to pay the assessment and quit rent. It defies logic.

Was There An Agreement To Be Enforced In This Instance?

The defence had submitted at length that at its height, there was merely an oral agreement between the late Mrs K Nagamany and the 1st defendant, but the terms and conditions of that oral agreement was not enforceable – as it was merely an oral agreement.

I find it is a totally misconceived proposition of law of the defence that an oral agreement, cannot be enforced. Order 81 r. 1(1)(a) for the record reads as follows:

1. Application by plaintiff for summary judgment

(1) In any action begun by writ indorsed with a claim:

(a) for specific performance of an agreement (**whether in writing or not**) for the sale, purchase or exchange of any property, or for the grant or assignment of a lease of any property, with or without an alternative claim for damages.

Quite clearly an oral agreement comes within the short compass of O. 81(1)(a), even though the agreement is in its oral form, so long as the agreement was not nebulous in terms of its subject matter, price or conditions.

Whether The Remedy Of Specific Performance Was Appropriate In The Present Case

On The Law

The learned authors of *Snell's Principles of Equity*, 28th edn, at pp. 571 to 572 said:

> Although the court will not order specific performance where damages would fully compensate the plaintiff, the converse of this proposition is not true. There are many cases in which the court will not grant specific performance even if the remedy in damages is insufficient; for specific performance is a discretionary remedy. This does not mean that it will be granted or withheld arbitrarily; the discretion is a judicial discretion and is exercised on well-settled principles. It means that in an action for the specific performance of a contract of the class usually enforced, the court may take into account circumstances which could not be taken into account, in an action for damages for breach of contract, such as the conduct of the plaintiff, or the hardship which an order for specific performance would inflict on the defendant.

There is a presumption in favour of specific performance of a contract to sell land, which is statutorily provided in s. 11 sub-s. 2, Specific Relief Act 1950 which reads as follows:

> (2) Unless and until the contrary is proved, the Court shall presume that the breach of contract to, transfer immovable property cannot be adequately relieved by compensation in money.

Simply put, specific performance is an equitable relief given by the court, to enforce against a defendant, the duty of doing what he agreed by contract. The plaintiff may obtain judgment for specific performance even though there has not been, in the strict sense of the word, any default by the defendant before the issue of the writ (*Hasham v. Zenab* [1960] AC 316, [1960] 2 WLR 374 PC; *Oakacre Ltd v. Claire Cleaners (Holdings) Ltd* [1982] Ch 197, [1981] 3 All ER 667). It can be seen that the remedy of specific performance is in sharp contrast, with the remedy by way of damages for breach of contract – where the court orders pecuniary compensation for failure to carry out the terms of the contract. The remedy of specific performance is both special, and extraordinary, in character, and the court has a discretion either to grant it or to leave the parties to their rights at law (*Re Scott and Alvarez's Contract, Scott v. Alvarez* [1895] 2 Ch 603 at 612, 615 CA; and *Jobson v. Johnson* [1989] 1 All ER 621, [1989] 1 WLR 1026 CA). The judge, as I said, must

exercise his discretion in a judicial manner (*Revell v. Hussey* [1813] 2 Ball & B 280 at 288; and *Conlon v. Murray* [1958] NI 17). The contract must be within the category of contracts of which specific performance will be granted, a striking example of contracts outside the scope of the remedy would be *Robertson v. St John* [1786] 2 Bro CC 140, where a promise to renew a lease in consequence of money already laid out, was held *nudum pactum*, and specific performance was refused.

I might as well point out that for the remedy of specific performance to be invoked the following conditions must be fulfilled:

(1) the contract is valid in form; and

(2) has been made between competent parties; and

(3) is unobjectionable in its nature and circumstances.

It is a correct statement of the law to say that specific performance is granted as a matter of course (*Hall v. Warren* [1804] 9 Ves 605 at 608) and this is so even though the judge feels that it is favourable to one party and not the other (*Haywood v. Cope* [1858] 25 Beav 140). The defendant, however, is not left without legal recourse, for if the defendant can rely on one of the recognised equitable defences then the defendant can avoid the contract.

In my judgment, in the context of the present case, there was a concluded contract as all the formalities had been observed. In particular, the parties had agreed on all the essential terms of the contract with the terms sufficiently certain, and precise, so that this court can order and easily supervise the performance of that contract. In *Lai Mew Seng v. Cosmopac Sdn Bhd* [1998] 1 CLJ 713 at p. 732:

> No authority is required for the proposition that specific performance can only be enforced where a contract is concluded and binding in law. Of crucial importance would be the requirement that all proper formalities had been observed and that the parties have agreed, whether expressly or impliedly, in regard to all the essential terms of the contract. The terms too must be precisely certain to enable the court to make an order and effect the exact performance of the contract. These are trite propositions.

In this case apart from the oral agreement between the deceased Mr Nagamany, and Mrs Lingam, there was equally a draft agreement prepared by a solicitor between the late Mrs Nagamany and the present 1st defendant wherein the salient features of the said sale of the property were agreed upon, albeit not executed. This to me more than suffices for a firm concluded contract.

A niggling piece of evidence was the rent of RM100 paid by Mrs Nagamany

towards the said property up until 1979. It did prey on my mind that this conduct of hers, was totally incongruous to the stand, that was taken by her, and her representatives, that the property was rightfully theirs. To this end, all I am prepared to say was that according to the plaintiff, it was done primarily because the title deeds had yet to be transferred into the late Mrs Nagamany's name, and there was a threat of eviction proceedings by the 1st defendant. It was for this reason, that the rent was paid and was continued to be paid pursuant to the court order of 28 July 1980.

Paragraphs 11, 12, 13, 14 and 15 of the statement of claim of the plaintiff were, according to the defence counsel, a complete *volte face* to the evidence and stand taken by them, that the property was from the outset beneficially owned by them. I have perused the said paras. 11, 12, 13 and 14 which speaks of, on going negotiations, between the late Mrs Nagamany and the 1st defendant, in respect of the said property, and its purchase price. Be that as it may, the point of the matter is that these negotiations culminated in an agreement drafted by the 1st defendant's solicitors, agreeing to transfer the property in question for love and affection. This to my mind was the most salient aspect, and which convinced me that a valid agreement was concluded. Mr Thevanthiran, the solicitor was not even cross-examined, or offered by the defence, and to dispel this notion of the defence that the agreement was not drafted in accordance with her wishes. I am thus fortified to hold that a valid agreement was reached, between the 1st defendant and Mrs Nagamany.

On the strength of the draft agreement of 16 October 1974, and totality of evidence, I find that the plaintiffs have established on a balance of probabilities – a case of specific performance of an agreement to transfer the said property, namely CT 23286, Lot 40415, to the plaintiff as beneficiaries/representatives of the estate of Mr K Nagamany Nee Sugirtha Letchumy d/o Ayadurai.

As to the other claims of the plaintiff, I do not propose to dwell on it, I found no evidence to justify their claims in respect of prayer (c), (d) and (e) of the plaintiff's claim. There is no cross appeal by the plaintiff in respect of these claims.